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No. 83-1245

In The

Supreme Court of the United States

October Term, 1983

ROBERT L. WILHELM,

Petitioner,

vs.

CONTINENTAL TITLE COMPANY,
ANGELO J. VISCONTI, and
DOROTHY J. PORTER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly upheld the district court in dismissing the third claim of the second amended complaint on the ground that Dorothy J. Porter has absolute official immunity from suit under 42 U.S.C. 1983 and the due process clause of the fourteenth amendment to the Constitution of the United States.

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OPINIONS BELOW

An oral opinion was issued by the United States District Court for the District of Colorado on May 12, 1982.

An opinion (not yet reported) was issued by the United States Court of Appeals for the Tenth Circuit on November 7, 1983.

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is November 7, 1983.

Petitioner relies on 28 U.S.C. 1254(1) and erroneously asserts that the Circuit Court of Appeals for the Tenth Judicial District departed from the accepted and usual course of judicial proceedings calling into question this court's power of supervision.

STATUTES AND RULES INVOLVED

Rule 12(b) Federal Rules of Civil Procedure:

> (b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as pro-

vided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Colo. Rev. Stat. 1973, 24-34-306(1), (2) and (4):

24-34-306. Charge — complaint — hearing — procedure. (1) Any person claiming to be aggrieved by a discriminatory or unfair practice as defined by parts 4 to 7 of this article may, by himself or his attorney-at-law, make, sign, and file with the commission a verified written charge in duplicate which shall state the name and address of the respondent alleged to have committed the discriminatory or unfair practice and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The commission, a commissioner, or the attorney general may in like manner make, sign, and file such charge. Prior to any other action by the commission, the respondent shall be notified of the charges filed against him. (2) After the filing of a charge, the director, with the assistance of the staff, shall make a prompt investigation thereof. The director shall determine as promptly as possible whether probable cause exists for crediting the allegations of the charge. If the director determines that probable cause does not exist, he shall dismiss the charge and shall notify the person filing the charge and the respondent of such dismissal. If the director determines that probable cause exists, the respondent shall be served with written notice which states with specificity the legal authority and jurisdiction of the commission and the matters of fact and law asserted. Immediately after such notice has been given, the director shall endeavor to eliminate such discriminatory or unfair practice by conference, conciliation, and persuasion.

• • •

(4) When the director is satisfied that further efforts to settle the matter by conference, conciliation, and persuasion will be futile, he shall so report to the com-

> mission. If the commission determines that the circumstances warrant, it shall issue and cause to be served, in the manner provided by section 24-4-105 (2), a written notice and complaint requiring the respondent to answer the charges at a formal hearing before the commission, a commissioner, or a hearing officer. Such hearing shall be commenced within one hundred twenty days after the service of such written notice and complaint. Such notice and complaint shall state the time, place, and nature of the hearing, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted.

Rules and Regulations of the Colorado Civil Rights Commission, Rule 4 (currently rule 10.5, 3 C.C.R. 708-1):

> *Rule 10.5—Investigation, Dismissal and Conciliation*
>
> A. Expedited Resolution
>
> Before the Director conducts an in-depth investigation, the charging party and the respondent may be invited to meet with the Division staff in an attempt to resolve the charge and to discuss the charge.
>
> B. Discovery
>
> The Director may use discovery procedures as provided in the Colorado Rules of Civil Procedure during the investigation of a charge.
>
> C. Dismissal
>
> If the Director determines based either upon the face of the charge or upon the information gathered during the investigation that probable cause for crediting the allegations of a charge does not exist, the Director shall dismiss the charge and notify the charging party in writing by either personal delivery or mail at the charging party's last known address, together with a notice of the charging party's right to appeal the dismissal to the Commission as provided in Rule

5. A copy of such notice shall be delivered or mailed to the respondent named in the charge.

D. Conference, Conciliation and Persuasion

1. If for whatever reason the charging party fails or refuses to sign a proposed conciliation agreement which the Director has accepted on behalf of the Division, the charging party has the right to appeal the Director's action to the Commission as provided in *Rule 10.6*. A written notice of the Director's action and report shall be mailed to all parties at their last known address no later than 5 days prior to the date the report is made to the Commission.

2. If conciliation fails and the Commission issues a written notice and complaint, the notice and complaint shall be delivered or mailed to the respondent at the last known address. If the notice is not served within 180 days after the filing of the charge, plus any extensions permitted as provided in 24-34-306(11), the jurisdiction of the Commission over the complaint shall cease, and the charging party may seek relief authorized in the law.

E. Disclosure

Without the written consent of all the parties, the Commission, the Director and the staff shall not disclose the filing of a charge, the information gathered during the investigation, or the efforts to eliminate such discrimination or unfair practice by conference, conciliation or persuasion unless the disclosure is made in connection with the conduct of the investigation, in connection with the filing of a petition seeking appropriate injunctive relief against the respondent under 24-34-507, or at a public hearing. Nothing in this paragraph shall be construed to prevent the Commission, the Director or the staff from disclosing final action on a charge, including the reasons for dismissing the charge and terms of a conciliation agreement, or the contents of an order issued after hearing.

F. Evidence Examination

Any of the parties or their counsel may examine any evidence contained in the investigative file of the charge, excluding documents or information made confidential by law. Evidence does not include Commission or Division staff work products or documents excluded by attorney-client privilege.

STATEMENT OF THE CASE

Respondent, Dorothy J. Porter, adopts the statement of the case as presented by the petitioner, with the exception that respondent maintains that the district court on May 12, 1982 granted respondent's motion to dismiss without regard to any factual matters outside the pleadings, and therefore did properly follow the Federal Rules of Civil Procedure.

SUMMARY OF ARGUMENT

The district court did not rely on any factual matters outside of the pleadings before it and, therefore, properly granted respondent's motion to dismiss without converting it to a motion for summary judgment. Under the circumstances of this case, involving an issue of absolute immunity rather than qualified immunity, the motion to dismiss was properly granted for lack of subject matter jurisdiction, as a matter of law.

ARGUMENT

Where a trial court does not consider factual matters outside the pleadings, it is proper for the court to act on a motion to dismiss without converting it to a motion for summary judgment. *Hansbury v. Regents of the University of California*, 596 F.2d 944 (1979). In this case respondent Dr. Dorothy J. Porter, filed a motion to dismiss, motion for summary judgment or, in the alternative, motion to abstain and a brief in support of the motion directed at the second amended complaint. Attached to this brief were a letter from Dr. Porter to plaintiff Wilhelm advising him that the director had closed his complaint for failure of conciliation and advising him of his appeal rights under the Colorado Civil Rights Commission's rules. Also, attached to the brief were the commission rules which had been formally promulgated by the commission and currently published at 3 C.C.R. 708-1 *et seq.* These documents were attached to the brief and cited in support of the issues raised other than the issue of lack of jurisdiction based on absolute immunity. The district court, in granting the motion, only referred to it as a motion to dismiss and cited and relied only on the state statute, Colo. Rev. Stat. 1973, 24-34-306 and rule 4 of the commission's rules (currently rule 10.5, 3 C.C.R. 708-1, pp. 5-6). Rule 4 (10.5) of the commission rules constitutes a legal authority much like the statute rather than a factual matter. Without attachment to the brief the court could have considered the rule by citation alone. The court of appeals in its decision specifically cited the trial court's reliance on Colo. Rev. Stat. 1973, 24-34-301 *et seq.* (Order of November 7, 1983, petitioner's petition, A-20.) The trial court found under that statute that:

> As director of the Colorado Civil Rights Division, Ms. Porter is required by statute to investigate charges of discrimination, make a finding of probable cause and make a report to the commission when conciliation efforts fail. Thus, she is in a position in the state administrative process that is similar to that of a judge, hearing officer or prosecutor. It is therefore logical that she should enjoy immunity in that regard.

(Oral Bench Order, Judge Sherman B. Finesilver, petitioner's petition for certiorari, A-41).

Thus, the district court treated the motion to dismiss as a motion to dismiss without regard to any matters outside the pleadings, based on the Colorado statute and agency regulation, as a matter of law. The case authority relied on by petitioner is inapplicable since all the cases cited rely either on questions of qualified immunity or involve situations where evidence outside the pleading was actually considered.

It must also be noted that the motion to dismiss, as granted, was based on lack of jurisdiction, which is not subject to the requirement that consideration of matters outside the pleadings requires that the motion shall be treated as one for summary judgment. See Federal Rules of Civil Procedure 12(b). *Hansbury, supra* at 948, n. 12.

Although it has been held in a number of cases that qualified immunity is an affirmative defense which may not be cited before trial except upon properly supported motion for summary judgment, absolute immunity can be disposed of on a motion to dismiss. *Imbler v. Patchman*, 424 U.S. 409 (1976); *Zapliler v. Robbins*, 507 F. Supp. 973 (D. Colo. 1981); *Friedman v. Weiner*, 515 F. Supp. 563 (D. Colo. 1981). In fact, in the case of *Butz v. Economou*, 438 U.S. 478, 512-513 (1978), the case establishing abso-

lute immunity in administrative adjudicatory officials, the United States Supreme Court upheld the granting of a motion to dismiss without treatment as a motion for summary judgment. *Id.* at 485.

Petitioner does not challenge the legal principle that an administrative adjudicator is entitled to absolute immunity. Here, in light of the Colorado statute, Dr. Porter, by law, clearly constitutes such an adjudicator. The motion to dismiss was properly granted.

CONCLUSION

It is respectfully requested that this court deny the petition for certiorari.

Respectfully submitted,

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